LIBRARY
SUPREME COURT, U. S.

FILED
DEC 22 1969
JOHN F. DAVIS, CLERK

In the Supreme Court
of the United States

OCTOBER TERM 1969

No. 983

EDWIN HARLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BEN T. GRAY
202 Mohawk Building
Portland, Oregon 97204
Of Counsel

MARVIN S. NEPOM
314 Oregon Bank Building
Portland, Oregon 97204
Attorney for Petitioner

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 12-69

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	4
Reasons for Granting the Writ	5
Conclusion	6
Appendix A—Opinion of the United States Court of Appeals	9

TABLE OF CASES

Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 83 S. Ct. 1185, 10 L. Ed. 2d 297 (1963)	6
Interlake Steamship Co. v. Nielsen, 338 F.2d 879 (C.A. 6th, 1964)	6
Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960)	6

TABLE OF STATUTES

Title 28, U.S.C.A., Section 1254(1)	2
Title 28, U.S.C.A., Section 1291	2
Title 46, U.S.C.A., Section 688	2, 5, 6
Title 46, U.S.C.A., Section 740	3, 6
Title 46, U.S.C.A., Section 741	2
Title 50 App., U.S.C.A., Section 1291	2

In the Supreme Court
of the United States

OCTOBER TERM 1969

No._____

EDWIN HARLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, EDWIN HARLING, plaintiff-appellant below, respectfully prays a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on September 22, 1969.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court is reported at 416 F.2d 405 and is appended at page 9.

JURISDICTION

Jurisdiction of the U. S. District Court for the District of Oregon is based on Title 46, U.S.C.A. § 741, original jurisdiction under the Suits in Admiralty Act by virtue of the Clarification Act, Title 50, App. U.S.C.A. § 1291.

Jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 28, U.S.C.A. § 1291.

The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTION PRESENTED

Does the doctrine of unseaworthiness in Admiralty jurisdiction extend to a seaman's contacting dengue fever by reason of a mosquito bite occurring ashore while the seaman was in the service of the vessel,

STATUTES INVOLVED

46 U.S.C.A. § 688:

§ 688. *Recovery for injury to or death of seaman*

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007.

46 U.S.C.A. § 740:

§ 740. *Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period*

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where

the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further*, That no suit shall be filed against the United States after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage. June 19, 1948, c. 526, 62 Stat. 496.

STATEMENT OF THE CASE

Appellant, plaintiff, a merchant seaman became ill with a tropical disease known as dengue fever on December 10, 1966, in Singapore. Dengue fever is endemic to that area (Tr. 80). Appellant had signed foreign articles on November 28, 1966, for a voyage return and was flown to and arrived in Singapore on approximately December 1, 1966 (Tr. 4). When appellant arrived in Singapore he stayed the first two nights at a hotel, then two nights on a vessel and the next four nights at the Seaman's Club (Tr. 8); during that period of time appellant worked on the vessel during the day, however ate his meals ashore (Tr. 19-22). The employer provided bus transportation ashore and paid for the meals; no meals were served on the vessel (Tr. 57). After work a bus would

transport appellant to uptown Singapore at 4:30 p.m. (Tr. 21). The employer also paid appellant's hotel expense (Tr. 18).

A domesticated mosquito known as the Aedes Aegypti is the vector in Asian urban areas of dengue fever (Tr. 73). In the Singapore area one of the peak times of the day during the month of December that the Aedes Aegypti would bite was just before sunset, 5:00 to 5:00 p.m. (Tr. 79). The concentration of Aedes Aegypti occurred in the highly congested area of uptown Singapore (Tr. 77).

In entering judgment in favor of appellee the district court held that the ship was live and ready to move during the period applicable herein, however that appellant might just as well have contracted dengue fever in uptown Singapore or any other place than on the ship (Tr. 82). Had the court found liability it would have allowed damages in the amount of $1,600 special damages and $2,500 general damages, a total of $4,100 (Tr. 83).

The United States Court of Appeals for the Ninth Circuit affirmed holding that the doctrine of unseaworthiness does not extend to injuries caused by instrumentalities ashore having no connection with the vessel (Appendix A).

REASONS FOR GRANTING WRIT

The question presented is of great concern to injured seamen. 46 U.S.C. § 688 has made it clear that

an injured seaman shall have all the rights and remedies of an injured railroad employee in a federal employers liability case. *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960).

The Admiralty Extension Act, 46 U.S.C.A. § 740, extended admiralty jurisdiction to damages caused on land by maritime events. *Interlake Steamship Co.* v. *Nielsen*, 338 F.2d 879 (C.A. 6th, 1964). The passage of the Admiralty Extension Act of 1948 removed any prior limitation on the doctrine of unseaworthiness pertaining to the physical agency of the vessel or particular part of it and extended admiralty jurisdiction and its applicable doctrine to damages or injury notwithstanding that such damage or injury be done or consummated on land. *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 209, 83 S. Ct. 1185, 10 L. Ed. 2d 297 (1963).

The decisions in the courts below fail to apply the warranty of seaworthiness to injuries occurring on land while in the service of the vessel as contemplated by 46 U.S.C.A. 688 and 46 U.S.C.A. 740 and the applicable case law above cited.

CONCLUSION

It is important that this Court protect the right of an injured seaman to recover for personal injuries sustained ashore while in the service of a vessel, and therefor petitioner respectfully prays that his petition

for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be granted.

Respectfully submitted,

MARVIN S. NEPOM
314 Oregon Bank Bldg.
Portland, Oregon 97204
Attorney for Petitioner

BEN T. GRAY
Mohawk Bldg.
Portland, Oregon 97204
Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWIN HARLING,)
Appellant,)
vs.) No. 22,970
UNITED STATES OF AMERICA,)
Appellee.)

[September 22, 1969]

Appeal from the United States District Court
District of Oregon

Before: MADDEN,* Judge of the United States Court of Claims, MERRILL and CARTER, Circuit Judges.

PER CURIAM:

Appellant, a seaman on a United States vessel, brought this action for damages based on the alleged unseaworthiness of the vessel.

Appellant's theory as formalized by a pretrial order was that while sleeping on the vessel in Singapore, he was bitten by a mosquito and contracted dengue fever; that the vessel was unseaworthy in that it did not have screens on the portholes to the room in which he slept.

The trial court found against appellant on the facts: that there was no custom or requirement for screens; that appellant did not carry his burden of

proof as to proximate cause; that appellant might have contracted the fever in town rather than on the ship; and that the particular mosquito will not bite at nighttime.

After the court's decision the appellant moved to amend the findings, conclusions of law and judgment, and the pretrial order to include another theory, to-wit that the ship carried the disease of dengue fever. This theory was no more valid than the first theory. The motion was denied.

The case was tried on the theory outlined in the pretrial order. Counsel, after trial and an adverse decision, was properly denied leave to amend.

The doctrine of unseaworthiness does not extend to injuries caused by instrumentalities ashore having no connection with the vessel. *Morales* v. *City of Galveston*, (1962) 370 U.S. 165, 171.

The judgment is Affirmed.

---

* Hon. J. Warren Madden, Senior Judge, United States Court of Claims, sitting by designation.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 983

EDWIN HARLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. pp. 9-10) is reported at 416 F. 2d 405. The decision of the district court (App. pp. 5-9) is unreported.

JURISDICTION

The order of the court of appeals was entered on September 22, 1969. The petition for a writ of certiorari was filed December 22, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the doctrine of unseaworthiness permits recovery by a seaman who contracted dengue fever through a mosquito bite that may have occurred while he was ashore.

STATEMENT OF THE CASE

Petitioner, a seaman on a vessel owned by the United States, brought this action in the United States District Court for the District of Oregon for damages based on the alleged unseaworthiness of the vessel. He alleged that while sleeping on the vessel in Singapore, he was bitten by mosquitoes and contracted dengue fever therefrom. The vessel was unseaworthy, he claimed, because there were no screens on the portholes (App. p. 7).

The district court, after trial, found that there was no custom or requirement that screens must be placed over the portholes (App. p. 7). The court also found that the particular type of mosquito which transmits the disease does not bite at night and that petitioner could have contracted the disease in town rather than on the ship (App. pp. 7-8).

The court of appeals affirmed, stating that "[t]he doctrine of unseaworthiness does not extend to injuries caused by instrumentalities ashore having no connection with the vessel" (Pet. App. p. 10).

ARGUMENT

Petitioner did not appeal the district court's finding that the ship was not unseaworthy because of the

lack of screens on the portholes. Nor does petitioner now contend that the vessel was unseaworthy because there were mosquitoes on it. Rather, petitioner urges that the vessel was unseaworthy in some inexplicable way because there were disease carrying mosquitoes in the commercial area of Singapore (Pet. p. 5). As this Court stated in *Gutierrez* v. *Waterman*, 373 U.S. 206, 213, however:

> [T]he seaworthiness doctrine * * * is in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used. * * *

In the instant case petitioner fails to explain what part of the vessel was not "reasonably fit for [its intended] purpose." Rather, he contends that an instrumentality unrelated to the ship (a mosquito in the city of Singapore) is included under the doctrine. This Court has already rejected such a theory in *Morales* v. *City of Galveston*, 370 U.S. 165, 170. Petitioner apparently has confused recovery for maintenance and cure (which was provided in the instant case (App. pp. 7, 8)) with the doctrine of unseaworthiness (Pet. pp. 6-7). The former depends on activity in the service of a vessel (Gilmore and Black, *The Law of Admiralty*, § 6-6)—which may well have been present here—while the latter depends on a finding that some part of the ship, its appurtenances, crew, etc., was not fit for its intended use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

ROBERT V. ZENER,
ROBERT M. FEINSON,
Attorneys.

JANUARY 1970.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 67-33

EDWIN HARLING, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ORDER

This case came on regularly for trial before the undersigned Judge on Monday, January 22, 1968. Plaintiff appeared in person and by his attorney, Mr. Ben T. Gray. Defendant appeared by Mr. Jack G. Collins, First Assistant United States Attorney, and by Mr. Erskine B. Wood, of counsel for defendant. Opening statements having been made and evidence received on behalf of both plaintiff and defendant, and the Court being advised, does hereby make and enter findings of fact, conclusions of law and judgment order as follows:

FINDINGS OF FACT

1. Plaintiff is a merchant seaman and this action is brought pursuant to and under the Suits in Admiralty Act and the Public Vessels Act, by virtue of the Clarification Act, 50 App. U.S.C. § 1291.

2. At all material times defendant owned and operated the SS CLARKSBURG VICTORY, an American public vessel of the Victory ship class, for which J. J. Tennant Company, an Oregon corporation, was shore-

side husband under a certain general agency agreement.

3. Plaintiff, prior to commencing this action, submitted an administrative claim and fully complied with National Shipping Authority Order No. 67, pursuant to the Clarification Act, and has done everything administratively required before filing this action, and his said administrative claim has been disallowed by defendant.

4. Prior to plaintiff's employment, the SS CLARKSBURG VICTORY had been seriously damaged in the Saigon River, Vietnam, and had been towed to Singapore, where extensive repairs were made at a shipyard in Singapore.

5. In November, 1966, as repairs to the vessel in Singapore were nearing completion, plaintiff and five other seamen were engaged in Portland, Oregon, to fly to Singapore to work aboard the vessel in order to prepare the vessel to receive the remaining members of a full crew, in order to return the vessel to the United States. The master and chief engineer had remained with the vessel in Singapore. Plaintiff was employed as chief steward and arrived in Singapore on or about November 30, 1966.

6. After arriving in Singapore, plaintiff and the other seamen slept ashore in hotels for two or three nights, but worked during the daytime aboard the vessel. Then plaintiff slept two nights aboard the vessel in the chief steward's room. Then plaintiff returned to sleep ashore, at the Seamen's Club in Singapore for several nights.

7. No meals were served aboard the vessel and plaintiff and the other crew members ate all their meals ashore. Bus service was provided by the vessel's agents to take them to restaurants ashore for breakfast, lunch and dinner.

8. On December 10, 1966, plaintiff came down with an illness known as dengue fever, a tropical disease which is endemic to the area, and is caused by a virus transmitted by a species of mosquito known as Aedis aegypti.

9. Plaintiff was hospitalized with dengue fever at the Singapore Nursing Home from December 10 to December 22, 1966. He was then discharged from the hospital and several days later was repatriated to the United States.

10. On January 17, 1967, plaintiff suffered symptoms of prostatitis and benign prostatic hypertrophy, for which he was subsequently treated at the United States Public Health Service Hospital in Seattle, being discharged as fit for duty on April 24, 1967. Plaintiff, at the commencement of trial, conceded that there was no causal connection between his dengue fever illness and his prostate difficulties.

11. It was plaintiff's contention and theory that he was bitten by mosquitoes during the nighttime during the two nights that he slept aboard the vessel in the chief steward's room and that this was due to unseaworthiness of the vessel for failure to provide screens in the chief steward's room and negligence in failing to put up such screens.

12. The Court finds that plaintiff has failed to sustain the burden of proof that lack of screens was a proximate cause of his contracting dengue fever.

13. The Court finds that there is no evidence that by custom and practice screens to protect against mosquitoes are required aboard vessels. The Court also finds that upon the great weight of evidence the particular mosquito which is the vector of dengue fever will not bite at nighttime and would not have bitten plaintiff during the times that plaintiff claims he was bitten and while plaintiff was sleeping in the chief steward's room.

14. The Court finds that upon the evidence plaintiff might just as well have contracted dengue fever in town or any place other than the ship.

15. The Court finds that the vessel was in sufficient state of readiness to move that it was a vessel to which the warranty of seaworthiness would apply.

16. Plaintiff was paid his wages in full to January 5, 1967, which was the date of the end of the voyage.

17. Upon the medical testimony, the Court finds that plaintiff did not sustain any permanent illness or injury or symptoms as a result of dengue fever. However, plaintiff did sustain a temporary illness and disability lasting six to eight weeks from the date of the onset of the illness (December 10, 1966). If the Court had found liability, the Court would have allowed damages in the amount of $1,600.00 special damages for loss of wages (at $800.00 per month), and $2,500.00 as general damages for pain and suffering.

Conclusions of Law

Based upon the foregoing findings of fact, the Court makes the following conclusions of law:

1. Plaintiff has failed to prove that the SS Clarksburg Victory was unseaworthy or that the defendant was negligent, and has failed to prove that any unseaworthiness or negligence was a proximate cause of his illness, and therefore the Court concludes that there is no liability on the part of defendant to plaintiff.

2. Judgment should be entered in favor of defendants and against plaintiff.

JUDGMENT ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED and ADJUDGED as follows:

1. Plaintiff shall take nothing from defendant in this action.

2. Judgment is entered against the plaintiff and in favor of the defendant and defendant shall recover its taxable costs against plaintiff.

DATED this 2nd day of February, 1968.

/s/ JOHN F. KILKENNY
United States District Judge

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 373785 439